

lit.

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HLD COMPANY,

Appellant,

v.

PUGET SOUND AIR POLLUTION CONTROL
AGENCY,

Respondent.

PCHB NO. 92-44

ORDER DISMISSING FOR
LACK OF JURISDICTION

The Board having reviewed Respondent's Motion and Affidavit for Order of Dismissal and Appellant's answering Affidavit, the Board finds that:

PSAPCA (the agency hereinafter) served Notice and Order of Civil Penalty No. 7491 on HLD on or about November 13, 1991; that HLD submitted an application for remission or mitigation to the agency by letter dated November 21, 1991; that the agency has not yet made disposition of HLD's application; and that HLD filed this appeal with the Pollution Control Board on March 3, 1992.

The Board has considered these facts, RCW 43.21B.300(2), and the governing WAC's.

WAC 371.08.080(1) states:

...the notice of appeal shall be filed within thirty days from the date the copy of the order or decision of the agency was communicated to the appealing party.

WAC 371.08.085(1) requires that:

Timely filing of the notice of appeal with the board must ...be accomplished for the board to acquire jurisdiction.

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(1)

1 The Board concludes that it does not have jurisdiction to
2 consider this appeal for two separate and distinct reasons, either one
3 of which would be sufficient:

4 (1) HLD did not file this appeal with the Board until March 3,
5 1992, more than the allowable thirty days after its receipt of the
6 agency's Order; and,


7 (2) Since HLD chose to submit an application for relief to the
8 agency before filing for review with this Board and since the agency
9 has not yet made disposition of the application, HLD's appeal to this
10 Board is premature, and such appeal, if any, must be filed with the
11 Board within thirty days from the date HLD is served with agency's
12 decision on the application for relief.

13 THEREFORE, the Board finds that it has no jurisdiction over this
14 matter at this time and this appeal is


15 DISMISSED without prejudice.

16 DONE this 17th day of April, 1992.

17 POLLUTION CONTROL HEARINGS BOARD

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19 HAROLD S. ZIMMERMAN, Chairman
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23 ANNETTE S. MCGEE, Member
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26 JOHN H. BUCKWALTER
27 Administrative Law Judge

ORDER DISMISSING FOR
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lib.

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FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DISSENTING OPINION

The Board issued an Order of Dismissal without prejudice. Therefore, the Board has concluded HLD Company may subsequently file an appeal with this Board, contesting the penalty, when the company is no longer before the Puget Sound Air Pollution Control Agency ("PSAPCA").^{1/} Based on the facts of this case, this Board Member concludes appellant Company has withdrawn from PSAPCA jurisdiction, and therefore the Motion to Dismiss should be denied.

FINDINGS OF FACT

I

On November 13, 1992 the Puget Sound Air Pollution Control Agency (PSAPCA) issued Notice and Order of Civil Penalty to HLD Construction Company, Inc., and Atochem North America, Inc. (No. 7491). The Order

^{1/} In the context of this case, the other opinion's language on not having filed within 30 days, (at page 2 lines 2 through 6), is *dicta* and without precedential effect.

1 alleged violation of PSAPCA Regulation III, Article 4 in the removal
2 of asbestos.

3 II

4 On December 2, 1992 appellant HLD timely filed an Application
5 with PSAPCA for Remission or Mitigation of the penalty
6 ("Mitigation").

7 By letter dated December 3, 1992, PSAPCA sent a letter to HLD
8 acknowledging receipt of their transmittal, stating:

9 This application will be evaluated pursuant to the
10 requirement of Section 3.29(e) of PSAPCA's Regulation I
11 that *"the control Officer shall remit or mitigate the
12 penalty only upon a demonstration by the requestor
extraordinary circumstances such as the presence of
information or factors not considered in setting the
original penalty."*

13 Notice of the Disposition of the Application for Relief
14 from Penalty will be forthcoming. [...]

15 The document was signed by Ronald L. Busby, Enforcement Services
16 Administrator.

17 III

18 Sometime in February 1992 an agent for HLD called PSAPCA and
19 inquired from the records administrator if a time period existed for
20 deciding the Application. She responded she did not believe there was
21 one. Upon her checking with Mr. Busby, she informed the agent that Mr.
22 Busby had said HLD Co. could appeal to the Pollution Control Hearings
23 Board if it felt the determination was taking too long.

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26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DISSENTING OPINION
27 PCHB NO. 92-44

1 On March 3, 1992 HLD filed an appeal with the Pollution Control
2 Hearings Board.

3 IV

4 On March 11, 1992 respondent PSAPCA through its attorney filed a
5 Motion to Dismiss with Affidavits and Exhibits in Support. PSAPCA
6 contends the appeal is not timely at this time because PSAPCA has not
7 completed its review of the Application for Recission/Mitigation,
8 citing RCW 43.21B.300(2).

9 On March 26, 1992 appellant HLD filed a letter and Affidavit in
10 Opposition. Appellant Company stated its concerns about PSAPCA's not
11 having made a decision. Appellant contended that due to the PSAPCA
12 records, with the penalty order outstanding, the company has lost an
13 asbestos removal contract and is in danger of losing two more.
14 Appellant stated it wanted the appeal heard by the Pollution Control
15 Hearings Board.

16 V

17 Any Conclusion of Law deemed to be a Finding of Fact is hereby
18 adopted as such.

19 From these Findings of Fact, the following Conclusions of Law
20 issue:

21 CONCLUSIONS OF LAW

22 I

23 A party contesting a PSAPCA penalty order cannot simultaneously be
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1 before the issuing authority requesting mitigation, and before the
2 Pollution Control Hearings Board.

3 II

4 Appellant voluntarily filed an Application for Mitigation with
5 PSAPCA. Appellant has the right to remove itself from this
6 non-mandatory process and file an appeal with the Board. Respondent's
7 Enforcement Services Administrator conceded this. To hold otherwise
8 would leave appellant without a remedy to extricate itself from the
9 once voluntary PSAPCA process. Filing an Application for Mitigation
10 under such a reading of the law would truly be a trap for the unwary.
11 It would also undermine a party's right to timely review by this
12 Board. My colleagues' opinion did not address this issue. It is
13 likely they did not intend to leave appellant in such a legal limbo.

14 III

15 From the facts presented, this Board Member concludes appellant
16 HLD has withdrawn its Application for mitigation. Appellant's
17 withdrawal from PSAPCA jurisdiction occurred on March 3, 1992,
18 contemporaneously with filing the appeal with the Board. Therefore
19 appellant is not before both the Agency and the Board, and the Board
20 has jurisdiction.

21 It does appear that Board Members differ on whether HLD Company
22 had effectively withdrawn from the PSAPCA process. If that is the
23 case, HLD can easily rectify any such misperceptions by a clear
24 statement.

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
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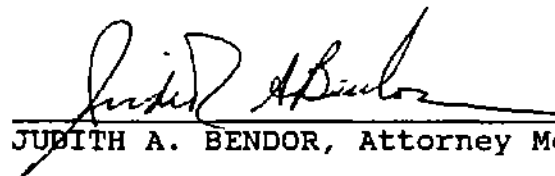
1 IV

2 Once an appellant has filed a Mitigation Application with the
3 authority which issued the permit, the 30 day period for filing an
4 appeal with this Board does not begin until appellant either receives
5 the Mitigation decision, or withdraws its Application. Since withdrawl
6 occurred, and filing the appeal with the Board occurred on the same
7 day, the 30-day deadline was met.

8 V

9 Any Finding of Fact deemed a Conclusion of Law is hereby adopted
10 as such.

11 From these Conclusions of Law, the Motion for Dismissal should be
12 DENIED.

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15 JUDITH A. BENDOR, Attorney Member
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